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Supreme Court of the United States

October Term, 1993

SANFORD J. BERGER
Petitioner

- vs -

CITY OF CLEVELAND
Respondent

# PETITION FOR A WRIT OF CERTIORARI
## To The Supreme Court of Ohio

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## QUESTIONS PRESENTED

1. Does a local ordinance violate the Fourth and Fourteenth Amendments when it permits warrantless searches of an owner's multi-family apartment building, without valid consent being given, due to the threat of his being criminally prosecuted for failure to permit a warrantless search?

2. Does federal constitutional due process afford a state criminal defendant implicit "standing" to challenge the federal constitutionality of a local ordinance, even though he was not charged with a violation thereof, when such determination is a necessary element of a complete defense to the charges against him?

3. Does the sole fact that an individual is the actual or believed custodian of a multi-family apartment building suffice to provide such individual with actual or "apparent authority" that would legitimize his consent to a search of the entire premises for Fourth

Amendment purposes?

4. Is the enforcement of a city's Housing Code against federally regulated private property preempted by federal constitutional and statutory law when such enforcement is explicitly prohibited by duly promulgated federal Housing Standards regulations, which are policed by federal inspectors, and which are consistent with a federal statutory scheme?

5. Is the owner of a federal "Sec.8-Mod. Rehab." apartment building, who is peforming a federally supervised statutory function of providing federally subsidized low-income housing pursuant to a 15 year contract with H.U.D., entitled to federal offical immunity and/or federal contractor immunity from a criminal prosecution by a city for claimed violations of its Housing Code?

6. Does a property owner have a "liberty" interest, protected by the due process provisions of the Fourteenth Amendment, when a local ordinance uses mandatory language to

create a presumption that criminal charges will not be filed if the owner corrects specific violations contained in a preliminary "Warning Notice?"

7. Is a party denied due process of law, in violation of the Fourteenth Amendment, when a state Court of Appeals denies such party a meaningful opportunity to respond to a claim by the prosecution (raised for the first time in its Answer Brief in that Court of Appeals) when such claim was not raised or determined in the first instance in the trial court?

8. Does an ordinance constitute an improper delegation of a city's legislative function, in violation of the Fourteenth Amendment, when it vests local housing inspectors with complete discretion to determine what constitutes a reasonable time within which violations contained in a written "Warning Notice" are to be corrected by a property owner?

Included Subsidiary Question:

Does federal constitutional due process

require that notice of appellate rights and procedures (that might avoid the filing of criminal charges) be given the affected party within sufficient time to allow his filing of an appeal?

## PARTIES

From the outset of these proceedings in 1991, Sanford J. Berger has been the defendant and appellant.

The City of Cleveland, from the outset, has been the plaintiff and appellee.

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Supreme Court of the United States

October Term, 1993

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SANFORD J. BERGER

**Petitioner**

**- vs -**

CITY OF CLEVELAND

**Respondent**

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

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Sanford J. Berger petitions for a writ of certiorari to review an Order of the Supreme Court of Ohio filed on March 2, 1994, denying review of a 9/30/1993 Order of the Court of Appeals of Cuyahoga County, Ohio which, in a 2-1 decision, upheld the conviction of the Petitioner by the Cleveland Municipal Court, on 1/15/92, for violations of Cleveland's Housing Code.

## OPINIONS BELOW

The Order of the Supreme Court of Ohio was filed on March 2, 1994 and appears at A1.

The Order of the Court of Appeals of Cuyahoga County, Ohio was entered on Sept. 30, 1993 and appears at A2-A45.

The Order of the Cleveland Municipal Court was filed on Jan. 15, 1992 and appears at A46.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The Opinion below was entered on March 2, 1994.

## CONSTITUTIONAL, STATUTORY, REGULATORY AND MUNICIPAL ORDINANCES INVOLVED

(All appearing in Appendix)

The Supremacy Clause, Article VI, Clause 2, of the United States Constitution. (A50)

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## STATEMENT OF THE CASE INCLUDING THE RAISING OF THE FEDERAL QUESTIONS

Petitioner had been the owner of an 18-suite apartment building in Cleveland, Ohio since May 23, 1982, having inherited from his father.

Prior to that date, he had commenced activity with the federal Department of Housing and Urban Development (HUD) through its Cleveland agent, the Cuyahoga Metropolitan Housing Authority (CMHA), which was also designated as HUD's Public Housing Authority (PHA).

The purpose of such activity was to determine whether the above property could qualify for the then existing "Section 8-Moderate Rehabiliation" Program. Said Program provided that if the property owner rehabilitated his property in accordance with federal Housing

Quality Standards, established by HUD in 24 CFR §882.109 (A48), then HUD would enter into a 15 year contract with the owner to provide him with subsidized rent for low-income tenants, conditioned upon the owner maintaining his property during that 15 year period in accordance with those federal Housing Quality Standards. To assure that the property was in constant compliance during that time, PHA inspectors would conduct regular inspections. In the event a violation of the federal Standards was found, the owner was given a reasonable time to correct the violation, and if a re-inspection disclosed that the violation had not been corrected, the owner was subject to rent forfeiture or having his HUD contract permanently cancelled.

In early 1982, petitioner obtained conditional site-approval of his property, but subject to his totally rehabilitating the property to comply with the federal Housing Quality Standards (HQS). Thereafter, PHA in-

spectors made a total inspection of the property; provided him with a Worksheet of what work had to be done, and the Worksheet was put out to building contractors for bids. The lowest bid was approximately $150,000; a construction loan of $150,000 was obtained; a contract was signed, and the rehabilitation work commenced. During the course of that rehabilitation work, the property was constantly subject to inspection by PHA inspectors as well as bank inspectors.

Eventually, the work was completed and final inspection approval given by the PHA, and Petitioner signed a 15-year contract with HUD under its "Section 8-Moderate Rehabilitation" Program -- said contract commencing March 1, 1983. Said contract further provided that Petitioner was not allowed to rent to tenants of his choice, but that pre-certified tenants would be provided to him by the PHA.

Thereafter, the PHA regularly inspected the property to determine if any HQS viola-

lations existed pursuant to §882.109. (A48). §882.109 further provides that local Housing Codes only apply if they are proposed by the PHA and approved by HUD. In this instance, the Cleveland Housing Code was never proposed by the PHA or approved by HUD as a variance to the federal HQS.

On or about June 18, 1991, a Cleveland Housing Inspector came upon the property, without a warrant, to conduct a surprise overall inspection to determine if any violations of Cleveland's Housing Code existed. At that point in time, the property was in total compliance with HUD's HQS.

Seeking some one in charge, bystanders directed the City Inspector to talk to one of Petitioner's tenants, Charles Bridget, and the Inspector thereupon identifed herself and asked Mr. Bridget if she could inspect the property. In response, Mr. Bridget responded that it was O.K. with him. However, the only basis for the Inspector's belief that Mr.

Bridget had authority to consent to the inspection was her mistaken belief that he was the custodian of the property; when, in fact, he was not the custodian. Nor did Mr. Bridget demonstrate any indicia that he had sufficient control or authority over the property in order to provide valid consent to a search thereof OR did the Inspector make any further inquiries of Mr. Bridget in order to determine if he, in fact, possessed such authority or control. Also, the Petitioner was never contacted by the Inspector to seek his consent to a warrantless inspection of his property prior to the inspection.

By virtue of Cleveland Ordinance §367.03, (A25), it is a criminal act, §367.99, (A25), for a tenant or owner to refuse permission to an Inspector to make a warrantless search for violations of Cleveland's Housing Code.

Following an inspection of the entire property, the Inspector issued a written Warning Notice to Petitioner pursuant to Cleveland

Ordinance §367.04(a), (A52), naming certain specific violations of Cleveland's Housing Code, and advising him that he had ten (10) days to make the necessary corrections.

Following a second warrantless and non-consentual search, the Inspector issued a "Ticket" criminally charging him with only one of the three violations contained on the Warning Notice, but now charging him with two new additional violations that had not been on the Warning Notice.

(THE RAISING OF THE FEDERAL QUESTIONS)

In the trial court, Petitioner filed Motions to Suppress and Dismiss. The first Motion was based upon the two illegal warrantless and non-consentual inspections of his property, while the second Motion was based upon federal preemption. Nowhere in the City's Opposition Brief to the Motion To Suppress, or in oral argument in the trial court, did the City raise the claim of third-party consent that might have justified the warrant-

less inspections of the property.

Both Motions were overruled by the trial court, and following a trial, Petitioner was found guilty on all three violation charges, and then fined $50.00 plus costs. (A46).

The federal issues were then raised in the state Court of Appeals by Petitioner, see (A19-20) which is part of the Court of Appeal's Opinion. In its Answer Brief in the Court of Appeals; the City, for the first time, presented its claims of third-party consent and lack of standing to challenge the federal constitutionality of C.O. §367.03 and C.O. §367.99.

Petitioner then prepared a Reply Brief in order to respond to these new claims by the City, and therein he advised the Court of Appeals of an intervening new decision by this Court that was rendered after both Briefs had been filed; Gade v. National Waste Management Ass'n, __U.S.__, 112 S.Ct.2374 (1992), which dealt with the preemption of

federal standards over state standards.

Petitioner then filed a Motion To File Reply Brief Instanter and tendered his Reply Brief therewith. Permission to file said Reply Brief was then denied by the Court of Appeals without an Opinion and without a showing of prejudice to the City, even though the City had not opposed that late filing.

On Sept. 30, 1993, the Court of Appeals issued its 2-1 Opinion affirming the trial court, and such Opinion was then journalized on October 12, 1993. (A2-45).

The majority's Opinion was based upon the legal argument contained in the City's Answer Brief, all of which had been distinguished in the unconsidered Reply Brief. Although the Petitioner's Brief contained 41 citations in support of his eight Assignments of Error, whereas the City's Brief in answer thereto only contained eleven citations, all of the Assignments of Error were "without merit." Moreover, the unaccepted Reply Brief con-

tained 78 citations that challenged the validity of the City's legal position, but the City's legal authority prevailed.

The majority's Opinion held that the Petitioner did not have "standing" to contest the federal constitutionality of C.O. §367.03 as he was not charged and/or convicted of an offense thereunder, whereas the dissent felt that there was "standing" and that both C.O. §367.03 and C.O. §367.99 were violative of the Fourth Amendment. (A43).

Petitioner then raised all of his federal questions in his appeal to the Ohio Supreme Court, and further claimed that there had been a denial of federal constitutional Due Process by the state Court of Appeal's denying the Petitioner the opportunity to respond to the new claims by the City in the Court of Appeals.

The Ohio Supreme Court dismissed the appeal on March 2, 1994. (A1).

## REASONS FOR GRANTING THE WRIT

1. A LOCAL ORDINANCE VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION WHEN IT PERMITS WARRANTLESS SEARCHES OF AN OWNER'S MULTI-FAMILY APARTMENT BUILDING, WITHOUT VALID CONSENT BEING GIVEN, DUE TO THE THREAT OF HIS BEING CRIMINALLY PROSECUTED FOR FAILURE TO PERMIT A WARRANTLESS SEARCH.

Cleveland Ordinance §367.03 (A25) permits the city Housing Inspector, or his representatives, to make warrantless inspections of all properties in the City of Cleveland in order to search for Housing Code violations, while §367.99 (A25) provides that criminal charges can be brought against any individual who refuses to permit such inspections.

As part of this argument, Petitioner incorporates the dissenting Opinion of Judge Harper in the state Court of Appeals (A21-45) as to the federal unconstitutionality of §§367.03 and 367.99.

Said sections are similar to the local

ordinance invalidated in Camara v. Municipal Court, 387 U.S. 523 (1867). The principles of Camara were then expanded to include commercial premises by See v. Seattle, 387 U.S. 541 (1967). As such, §§367.03 and 367.99 cannot be validated on the basis that the involved building is a multifamily commercial property with an absentee owner not on premises.

2. FEDERAL CONSTITUTIONAL DUE PROCESS AFFORDS A STATE CRIMINAL DEFENDANT IMPLICIT STANDING TO CHALLENGE THE FEDERAL CONSTITUTIONALITY OF A LOCAL ORDINANCE, EVEN THOUGH HE WAS NOT CHARGED WITH A VIOLATION THEREOF, WHEN SUCH DETERMINATION IS A NECESSARY ELEMENT OF A COMPLETE DEFENSE TO THE CHARGES AGAINST HIM.

Since this Court's decision in Katz v. United States, 389 U.S. 347 (1967), it has been the law that the "[c]apacity to claim the protection of the Fourth Amendment depends ... upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded

place." Minnesota v. Olson, 495 U.S. 91,95 (1990). Also, Rakas v. Illinois, 439 U.S. 128,143 (1978).

Petitioner had a legitimate claim of privacy against warrantless governmental intrusions on his property for general maintenance inspections. The City of Cleveland (City) cannot satisfy the second requirement in New York v. Burger, 487 U.S. 691,702 (1987), for permitting warrantless regulatory searches; namely, that such searches are necessary to further the regulatory scheme.

Due process requires that the state provide a criminal defendant with the right to present a complete defense (and that would include a Fourth Amendment defense). California v. Trombetta, 467 U.S. 479,485 (1984).

This Court recently affirmed the principle that warrantless searches are presumptively unreasonable, absent a showing of the existence of a few specifically delineated exceptions. Minnesota v. Dickerson, __U.S.__,__,

113 S.Ct. 2130,2135 (1993).

One such exception is that the search is based upon valid consent, but such consent must not be coerced by explicit or implicit means, or by implied threat or covert force. Schneckloth v. Bustamonte, 412 U.S. 218,228 (1973). The question is "[w]hether the [individual's] will was overborne and the capacity for self-determination is critically impaired." Schneckloth, supra, 225.

Because of the threat of criminal prosecutions, encounters between City Inspectors and owners and/or tenants in Cleveland are instinct with coercion. Where such coercion exists, consent to a search cannot be considered as voluntary. Bumper v. North Carolina, 391 U.S. 543,550 (1968).

Herein, if the supposed custodian, Bridget, was figuratively "seized" by the Inspector, his consent to a search of the Petitioner's property cannot be considered as voluntary. Florida v. Royer, 460 U.S. 491,501 (1983)

(plurality opinion). The question as to whether or not Bridget was "seized" by the Inspector is "[w]hether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." Florida v. Bostick, 501 U.S. 429,___, 111 S.Ct. 2382,2387 (1991).

As such, the federal constitutionality of §§367.03 and 367.99 is relevant to the City's claim that the warrantless inspections were justified on the basis of Bridget's consent thereto.

Because the state Court of Appeals Opinion (A2-18) failed to determine the constituionality of §§367.03 and 367.99 (on the basis that the Petitioner lacked standing to challenge those ordinances), a denial of federal constitutional Due Process occurred.

**3. THE SOLE FACT THAT AN INDIVIDUAL IS THE ACTUAL OR BELIEVED CUSTODIAN OF A MULTIFAMILY APARTMENT BUILDING DOES NOT SUFFICE TO PROVIDE SUCH INDIVIDUAL WITH ACTUAL OR "APPARENT**

AUTHORITY" THAT WOULD LEGITIMIZE HIS CONSENT TO A SEARCH OF THE ENTIRE PREMISES FOR FOURTH AMENDMENT PURPOSES.

The state Court of Appeals, at (A8-9), held that Bridget's consent was valid solely on the basis that the Inspector believed that he was the custodian of the subject property.

In United States v. Matlock, 415 U.S. 161, 171, n.7 (1974), it was held that a third-party, with mutual use of or joint access or control of a property for most purposes, can validly consent to a search thereof. However, such phrase has never been precisely defined by this Court. Nor has it been expanded upon to include a situation where the third-party did not have equal authority with the absentee owner.

The Matlock principle was based upon the "assumption of risk" theory." But, a property owner does not assume the risk that his real or imagined custodian, appointed for limited purposes only, could permit a search of such

property.

Moreover, consent to search is only effective when given by one with "[c]ommon authority over or sufficient relationship to the premises ... sought to be inspected." United States v. Karo, 468 U.S. 705,725 (1984) (O'Connor, J., concurring), and quoting from United States v. Matlock, supra, 171.

The employment of a custodian, in and of itself, does not confer such "[c]ommon authority over or sufficient relationship" to an owner's property so as to confer upon him the authority to consent to a search of such property -- especially when any resultant criminal consequences only befall the owner.

Illinois v. Rodriguez, 497 U.S. 177,185 (1990), established the principle of "apparent authority;" that is, consent to a search can be considered as valid if based upon factual determinations that are reasonable even though incorrect.

However, the federal Circuit Courts that

have interpreted Illinois v. Rodriguez have held that the "apparent authority" principle is only applicable to reasonable mistakes of fact, not to mistakes of law. In other words, if the facts thought to be true are insufficient to support a reasonable belief of actual authority, then the officer must obtain additional information. United States v. Rosario, 962 F.2d 733,738 (CA7,1993); United States v. Salinas-Cano, 959 F.2d 861,865-866 (CA10,1991); United States v. Whitfield, 939 F.2d 1071,1074 (CA,DC,1991), and United States v. Welch, 4 F.3d 761,764-65 (CA9,1993).

In the present case, the Inspector only had limited information that would have positively identified Bridget as the actual custodian, and no information that would have supported a reasonable belief that Bridget had any authority to permit a search. In fact, even if the authorizing person had been the actual custodian; that fact, standing alone, would not suffice to permit the assumption

that he had authority to agree to a warrantless search.

4. THE ENFORCEMENT OF A CITY'S HOUSING CODE AGAINST FEDERALLY REGULATED PROPERTY IS PREEMPTED BY FEDERAL CONSTITUTIONAL AND STATUTORY LAW WHEN SUCH ENFORCEMENT IS EXPLICITLY PROHIBITED BY DULY PROMULGATED FEDERAL HOUSING STANDARDS REGULATIONS, WHICH ARE POLICED BY FEDERAL INSPECTORS, AND WHICH ARE CONSISTENT WITH A FEDERAL STATUTORY SCHEME.

24 C.F.R. §882.109 (A48) clearly provides that the subject property had to conform to federal housing standards, and that variations can only exist if they "[are] proposed by the PHA and approved by HUD." In this case, the Cleveland Housing Code was never proposed as a variance by the local PHA or approved by HUD.

On page A15 of the lower Opinion, it is said that:

> We also find no evidence that the federal government explicitly preempted state law in the area of public housing or that

> Congress intended to exclusively regulate the area.

However, a distinction exists between the state regulation of state facilities and state regulation of federal facilities. When dealing with the former situation:

> [a]nalysis under the Supremacy Clause centers on whether Congress has taken affirmative action to pre-empt the state regulation in question ... On the other hand, because the Supremacy Clause immunizes the activities of the Federal Government from state interference,..., direct state regulation of federal facilities is allowed only to the extent that Congress has clearly authorized such regulation. (Citations omitted)
> Goodyear Atomic Co. v. Miller, 486 U.S. 174,180 n.1 (1988).

Goodyear involved a federally owned, but privately operated facility. However, this Court has never determined whether or not the principle set down in Goodyear is applicable to privately owned facilities that are performing federal statutory functions under a contract between the federal government and the owner of the private facility.

It has been held, though, that the "[f]ed-

eral function must be left free of (state) regulation." Hancock v. Train, 426 U.S. 167, 179 (1976), quoting Mayo v. United States, 319 U.S. 441,447 (1947). Also see Arizona v. California, 319 U.S. 423,451 (1931), holding that the United States may perform its functions without conforming to the policy of the state.

By way of analogy, the federal government's immunity from state taxation is to protect the ability of the federal government to perform its governmental functions. Davis v. Michigan Department of Treeasury, 489 U.S. 803,814 (1989). That same logic should also be applicable to the federal government's immunity from state regulation.

Permitting conflicting local regulation of the Petitioner's property results in local housing authorities being allowed to review federal determinations that his property meets federal standards for the providing of safe and sanitary housing for low-income in-

dividuals. Leslie Miller, Inc. v. Arkansas, 352 U.S. 187,189-90 (1956) and Sperry v. Florida, 373 U.S. 379,385 (1963).

It is well established that federal regulations issued by federal agencies have "[no] less pre-emptive effect that federal statutes." Capital Citizens Cable, Inc. v. Crisp 467 U.S. 691,699 (1984, quoting Fidelity Federal Savings and Loan Association v. De la Cuesta, 458 U.S.141,153 (1982).

Federal preemptive regulations are valid so long as they represent a "[r]easonable accomodation of conflicting policies that are within the agency's domain." Capital Citizens supra, 700.

A court's role is to determine whether the agency has exceeded its statutory authority or acted arbitrarily. Fidelity Federal, 153, which is not the situation in the present case.

A purpose of the federal low-income housing programs was to provide the local PHA's

with the maximum responsibility to administer such programs. See 42 U.S.C. §1437. (A47).

Consequently, federal approval of the City's Housing Code, prior to the enforcement thereof by the City, would have been necessary for the proper enforcement of the federal statutory low-income housing programs. Gade v. National Solid Wastes Management Assn ___U.S.___, 112 S.Ct. 2374 (1992). (plurality opinion).

5. THE OWNER OF A FEDERAL "SEC.8-MOD. REHAB." APARTMENT BUILDING, WHO IS PERFORMING A FEDERALLY SUPERVISED STATUTORY FUNCTION OF PROVIDING FEDERALLY SUBSIDIZED LOW-INCOME HOUSING PURSUANT TO A 15 YEAR CONTRACT WITH A FEDERAL AGENCY, IS ENTITLED TO FEDERAL OFFICIAL IMMUNITY AND/OR FEDERAL CONTRACTOR IMMUNITY FROM A CRIMINAL PROSECUTION BY A CITY FOR CLAIMED VIOLATIONS OF ITS HOUSING CODE.

At A15-16, the lower court reasoned that the Petitioner was not entitled to federal

official immunity because he was not performing a "uniquely federal interests" because he received federal rent subsidies for his tenants.

This Court recently reaffirmed the principle that the determination as to whether immunity is applicable is to be made on a "functional approach" basis. Buckley v. Fitzsimmons, 509 U.S.___,___, 113 S.Ct. 2606,2613 (1993), citing Burns v. Reed, 500 U.S. ___, 111 S.Ct. 1934,1939 (1991). Also, Antoine v. Byers and Anderson, Inc., 508 U.S. ___,___, 113 S.Ct. 2167,2171 (1993).

Such an approach looks to the "[n]ature of the function performed, not the identity of the actor who performed it." Forrester v. White, 484 U.S. 219,229 (1988).

Unlike the individual in United States v. Boyd, 378 U.S. 39,44 (1964), this Petitioner is not claiming federal official immunity merely because he is a governmental contractor; but rather, that he is performing a

federal statutory function. This Court has held that a private individual can be considered as a governmental actor when he is performing a governmental function pursuant to a contract with the government. West v. Atkins, 487 U.S. 42,55-56 (1988).

Also, the "[m]ore an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Marshall v. Alabama, 326 U.S. 501,506 (1945).

At issue is whether the Petitioner was a private actor or the equivalent of a governmental official, and an Ohio court has entertained that question. In Gorsuch Homes, Inc. v. Wooten, 73 Ohio App.3d 426,432 (1992), the following was said:

> The due process requirements of the Fourteenth Amendment apply to private landlords who provide Section 8 federally subsidized housing for low-income tenants. The government action requirement for the application of the requirement of constitutional due process is satisfied by the

> substantial governmental involvement in financing new construction and rehabilitating housing, the rental assistance pay-ments made directly to the owner by HUD on behalf of the tenant, the regulations imposed upon the owner by HUD, and the public function served by providing the housing. (Emphasis added)

Absent Congressional authorization, the property and functions of the United States are immune from state regulation or taxation. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 426 (1819).

Furthermore, state regulation against an individual who deals with the government has as much potential to obstruct the functions of the federal government as do regulations imposed against the government itself. North Dakota v. United States, 495 U.S. 423,438 (1990).

Complying with federal regulations is a burdensome task for the Petitioner, but then having to simultaneously defend against local criminal proceedings and having the badge of "Slum Landlord" pinned upon you by local

authorites imposes a heavier burden that intrudes into his ability to perform his federal responsibilities.

Moreover, Petitioner would be entitled to federal governmental contractor immunity if the application of a local Housing Code would frustrate the specific objectives of the federal legislation. Boyle v. United Technologies, Inc., 487 U.S. 500,507 (1988).

6. A PROPERTY OWNER HAS A "LIBERTY" INTEREST, PROTECTED BY THE DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT, WHEN A LOCAL ORDINANCE USES MANDATORY LANGUAGE TO CREATE A PRESUMPTION THAT CRIMINAL CHARGES WILL NOT BE FILED IF AN OWNER CORRECTS SPECIFIC VIOLATIONS CONTAINED IN A PRIOR "WARNING NOTICE."

This Court has held that an individual has a "liberty" interest, protected by the Due Process Clause where explicit mandatory language is used to create specific substantive predicates to official decision-making. Kentucky Department of Corrections v. Thomp-

son, 490 U.S. 454,463 (1989) and Hewitt v. Helms, 459 U.S. 460,471-472 (1983).

C.O. §367.04(a) (A52) provides that a "Warning Notice" shall be issued when a housing Inspector determines that a property has violations of the local Housing Code. Such section uses the mandatory word "shall." See Fantozzi v. Sandusky Cement Co., 64 Ohio St.3d 601,609 (1992).

At trial, page 22 of the Trial Transcript, the City's housing Inspector testified that the issuance of "Warning Notices" are part of the procedures followed by City housing Inspectors upon the finding of Housing Code violations.

Consequently, the Petitioner had more than a unilateral expectation that only those violations contained in a "Warning Notice" would be contained in any subsequent Ticket. There was, therefore, a legitimate claim of entitlement to such procedures. Perry v. Sindermann, 408 U.S. 593,601 (1972).

C.O. §367.04(a) clearly creates a presumption that any subsequent Ticket would only be issued for violations contained in the prior "Warning Notice" so as to create a "liberty" interest protected by the federal constitutional Due Process Clause. Board of Pardons v. Allen, 482 U.S. 377 (1987).

7. A PARTY IS DENIED DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, WHEN A STATE COURT OF APPEALS DENIES SUCH PARTY A MEANINGFUL OPPORTUNITY TO RESPOND TO A CLAIM BY THE PROSECUTION (RAISED FOR THE FIRST TIME IN ITS ANSWER BRIEF IN THE COURT OF APPEALS) WHEN SUCH CLAIM WAS NOT RAISED OR DETERMINED IN THE FIRST INSTANCE BY THE TRIAL COURT.

As previously argued, federal constitutional Due Process requires that a state criminal defendant be provided a fair opportunity to present a complete defense. California v. Trombetta, supra, 485.

Herein, the City, for the first time,

raised the argument that it had the voluntary consent of Bridget to conduct the search in its Answer Brief in the Court of Appeals. That defense by the City had never even been mentioned by the City (by testimony or legal argument) in the trial court.

First of all, the burden of proving that a warrantless search is justified by an exception to the warrant requirement is on the government. Coolidge v. New Hampshire, 403 U.S. 443,454-455 (1971), and that also includes the question as to the voluntariness of consent to a search. Bumper v. North Carolina, supra, 548.

However, in the present case, Petitioner was denied his federal constitutional Due Process right to have his Fourth Amendment defense fully and fairly adjudicated when the state Court of Appeals refused leave for him to file his tendered, but slightly tardy, Reply Brief in response to this new claim by the City.

Also, the issue of the voluntariness of a consent to search is a question of fact which is inappropriate for determination, in the first instance, by a court of appeals. See Thompson v. Louisiana, 469 U.S. 17,23 (1984). Further, a party forfeits facts on appeal that were not presented to the trial court. Elder v. Holloway, __U.S.__,__, 114 S.Ct. 1019,1022 (1994), and notice of the issues involved is an essential requirement of federal constitutional Due Process. Lankford v. Idaho, 501 U.S.__,__, 111 S.Ct. 1723,1732 and n.22 (1991).

In Evitts v. Lucey, 469 U.S. 387,401 (1985), it was held that federal constitutional Due Process requirements are applicable to state courts of appeals as of right. Such Due Process is denied when the state prevents a criminal defendant-appellant from fully adjudicating his rights. 469 U.S., at 405, which is the case at hand.

It is typically a state's appellate courts,

which by their nature, are a litigant's most appropriate forum for the resolution of federal constitutional questions. Huffman v. Pursue, Ltd., 420 U.S. 592,609 (1975).

The majority Opinion of the Court of Appeals herein (A2-20) is what is referred to by local appellate lawyers as a "Without Merit" Opinion, whereas the scholarly Dissenting Opinion (A21-45) is of a quality that would limit the number of appeals to this Court.

In essence, the Dissenting Opinion shows the proper respect for the Opinions of this Court, whereas the majority Opinion below discloses an indifference to this Court's decisions.

8. C.O. §367.04(a), (A52), CONSTITUTES AN IMPROPER DELEGATION OF A CITY'S LEGISLATIVE FUNCTION, IN VIOLATION OF THE FOURTEENTH AMENDMENT, BY VESTING LOCAL HOUSING INSPECTORS WITH COMPLETE DISCRETION TO DETERMINE WHAT CONSTITUTES A REASONABLE TIME WITHIN

WHICH VIOLATIONS CONTAINED IN A WRITTEN "WARNING NOTICE" ARE TO BE CORRECTED BY A PROPERTY OWNER.

C.O. §367.04(a), (A52), clothes the Housing Inspector with complete discretion to determine the amount of time necessary to make repairs prior to the filing of criminal charges against the warned property owner. That is, by virtue of the time allowed by the Inspector, he/she can control whether a property owner will, or will not, be charged with criminal activity.

In Brookpark Entertainment, Inc. v. Taft 951 F.2d 710,716-717 (CA6,1991), it was held that it was a denial of federal constitutional Due Process for a municipality to impermissibly delegate its legislative function to private parties who had the right to exercise arbitrary and discriminatory discretion as to who they will target, how often they will target, and how hard they will hit the targetted property owner.

INCLUDED SUBSIDIARY QUESTION:

FEDERAL CONSTITUTIONAL DUE PROCESS REQUIRES THAT NOTICE OF APPELLATE RIGHTS AND PROCEDURES (THAT MIGHT AVOID THE FILING OF CRIMINAL CHARGES) BE GIVEN THE AFFECTED PARTY WITHIN SUFFICIENT TIME TO ALLOW HIS FILING OF AN APPEAL.

This issue is raised pursuant to this Court's Rule 14.1(a).

C.O. §367.09, (A49), provides for the taking of an appeal within the time allowed in the "Warning Notice" for correcting the violations, or such appeal rights are waived. However, the involved "Warning Notice" only advises that one has the right to appeal from the issuance of a Ticket, and does not mention that the appeal has to be taken within the time allowed for repairs set down in the "Warning Notice."

At A10 of the lower court's Opinion, it is said that:

Berger had the right to appeal the ticket

and could have delayed its enforcement by appealing it.

That statement, however, is contrary to the appellate procedures that are set down in C.O. §367.09, and is incorrect. Moreover, the time period allowed for the required repairs in the "Warning Notice" issued to the Petitioner was only ten (10) days.

As such, a sufficiently short deadline for filing an appeal existed; which, in turn, created a high risk of forfeiture of the right to appeal for the failure to perfect an appeal within such short time period. See McCarthy v. Madigan, __U.S.__,__, 112 S.Ct. 1081,1090 (1992).

Accordingly, the time to perfect an appeal varies with the time allowed by the Inspector to complete the repairs. But, a property owner never knows of his appellate rights until he is criminally charged.

This Court has held that "... due process is flexible and calls for such procedural

protections as the particular situation demands." Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

In the recent case of J.C. Flatford v. City of Monroe, Michigan, 17 F.3d 162,169 (CA6,1994), our Sixth Circuit held that the fundamental fairness aspect of federal constitutional Due Process requires notice of available appellate procedures, but this Court has yet to decide such issue.

However, this Court has held that federal constitutional Due Process requires a "meaningful opportunity to respond at a meaningful time." Armstrong v. Manzo, 380 U.S. 545,552 (1965).

It would seem then, in all fairness, that in order for an affected individual to have a meaningful opportunity to respond, he must be timely advised of the procedures for filing a timely appeal prior to being criminally charged. Appellate procedures that are waived by the time you know they exist are meaningless.

## CONCLUSION

During the past 15 years, the attorneys below, at their own expense, have presented an estimated 15 Petitions to this Court for consideration. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) has been their one acceptance.

As always, they have endeavored to present substantial constitutional questions that they felt were of great public and general interest, and this current Petition requests answers to questions that have never been addressed by this Court previously.

Respectfully submitted,

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Lawyers for the Petitioner

The Supreme Court of Ohio

City of Cleveland
Appellee

v.

Sanford J. Berger
Appellant

1994 TERM

To Wit: March 2, 1994

Case No. 93-2445

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:
Motion Fee, $40.00, paid by Sanford Berger.
(Court of Appeals No. 63089)

/s/ Thomas Moyer
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 63089

| | | |
|---|---|---|
| CITY OF CLEVELAND<br>Plaintiff-Appellee<br>-vs<br>SANFORD J. BERGER<br>Defendant-Appellant | ( )<br>( )<br>( )<br>( )<br>( )<br>( )<br>( )<br>( ) | JOURNAL ENTRY<br>and<br>OPINION |

DATE OF ANNOUNCEMENT OF DECISION: SEPTEMBER 30, 1993

CHARACTER OF PROCEEDINGS: Criminal appeal from Cleveland Municipal Court Case No. 91-CRB-21611

JUDGMENT: Affirmed.

APPEARANCES:

For Appellee:

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PATRICIA A. BLACKMON, J.:

This is an appeal from a judgment of the Housing Division of the Cleveland Municipal Court, assessing a fine to Sanford J. Berger, defendant-appellant, for violation of C.C.O. 367.13 and 367.15. Berger challenges the judgment and assigns eight errors for our review.[1]

After a review of the record and the arguments of the parties, we affirm the decision of the trial court. The apposite facts follow.

Berger owns an apartment building in Cleveland, Ohio. In 1983, Berger entered into a fifteen year contract with the United States Department of Housing and Urban Development (HUD) for participation in the Section 8 program which provides rental subsidies for selected tenants. To conduct its required interior and exterior building inspection, HUD appointed the Cuyahoga Metropolitan Housing Authority.

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[1]See Appendix.

On June 18, 1991, a housing inspector arrived to inspect the building in response to an anonymous complaint. The exterior inspection revealed several maintenance violations. The building custodian escorted the inspector into the building and a resident allowed the inspector to inspect her apartment.

The inspector notified Berger of the violations and gave him 10 days to correct the problems. On July 23, 1991, a follow-up inspection revealed that the problems remained uncorrected. A ticket was issued listing violations of Cleveland Codified Ordinances 369.13 and 369.15.

On September 19, 1991, Berger filed unsuccessful motions for suppression of evidence and for dismissal of the complaint against him. He argued that the inspection constituted a warrantless search of the building and that C.O. 367.03 was unconstitutional since it allowed such searches. He

also argued that, since his building was controlled by the federal government, the local housing code was preempted by federal law and the building was immune from inspection by city housing inspectors. He also argued that governmental immunity or governmental contractor immunity barred a trial.

Berger's motions were overruled by the trial court. After a hearing, Berger was found guilty of violating C.C.O. 369.13 and 369.15. He was fined $50.00 plus costs. Berger filed a notice of appeal and a motion to suspend execution of his sentence.

Berger argues that C.O. 367.03 and C.O. 367.99 are unconstitutional. C.O. 367.03 requires that housing inspectors may, at any reasonable time, enter any dwelling in the city of Cleveland in order to enforce the Housing Code. It also provides that no person shall prevent the inspector from entering the premises. C.O. 367.99 imposes fines for refusing to permit housing inspectors to enter

the premises.

Berger was not convicted of violating C.O. 367.03 or 367.99. We find, therefore, that he lacks standing to challenge the constitutionality of these statutes. [sic.] "The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its allegedly unconstitutional provisions." Palazzi v. Estate of Gardner, (1987) 32 Ohio St.3d 169,175. C.O. 367.03 and 367.99 apply to the rights of a housing inspector to enter property for inspection and to the penalties for refusing entry. In the case sub judice, the housing inspector was allowed to enter. Berger was not charged with, or convicted of, violating C.O. 367.03 or 367.99. He was not within the class of persons with respect to whom the statutes are allegedly unconstitutional. See Palazzi, at

174. Berger's first assignment of error is without merit.

Berger also claims that the trial court erred in denying his motion to suppress evidence. He claims that the evidence of housing code violations was obtained through an illegal warrantless search of the property in violation of the Fourth Amendment. We disagree.

The Fourth Amendment protects against unreasonable searches and seizures. It does not protect against all searches. Generally, warrantless searches of homes are unreasonable. Ridgeway v. Union County Com'rs, (1991) 775 F. Supp. 1105. The same protection extends to commercial buildings. State v. Penn, (1991), 61 Ohio St.3d 720,723. An exception to the general rule prohibiting warrantless searches is a search by consent. State ex rel. Holcomb v. Wurst, (1989), 63 Ohio App.3d 629, dismissed 48 Ohio St.3d 711.

We find that the inspector obtained valid

consent for the search. Upon approaching the building, she identified herself as a city housing inspector and asked to see the custodian or other responsible person. Several people sitting on the steps of the building directed her to Charles Biridget. Bridget identified himself as the custodian. The inspector presented him with her identification and asked for permission to inspect the property. Bridget allowed the inspection.

Berger argues that Bridget was not employed as a custodian in the building and was not authorized to consent to the inspection. However, several residents of the building identified Bridget as the custodian. Bridget escorted the inspector into the common areas of the building. We find that, under the circumstances, the inspector was reasonable in her belief that Bridget had the authority to consent to the inspection. Consent to search is valid if it is obtained from a person with sufficient authority over the property to

give his consent, or at least from a person reasonably believed to have such authority. White Fabricating Co. v. U.S., (1990), 903 F.2d 404. The inspector had a reasonable belief that Bridget was authorized to consent to the inspection, therefore the search proceeded under valid consent. Finding no constitutional violation, we overrule Berger's second assignment of error.

Berger next argues that C.O. 367.04 denied him due process of law by improperly delegating the city's legislative authority to housing inspectors. He claims that it is improper to allow housing inspectors to decide the amount of time necessary to make repairs before criminal charges are filed against the property owner. We disagree.

The housing code covers many different structures within the city of Cleveland. Some code violations may be more extensive than others, requiring more time to complete repairs. The vast number of different viola-

tions necessitates that the time for repair be established on a case-by-case basis. Despite Berger's argument that this policy offers the potential for arbitrary and discriminatory treatment of property owners, he has presented us with absolutely no evidence that he was unfairly "targeted" by housing inspectors. The statute provides that a property owner may appeal a ticket within the time allowed for compliance. Although the owner must still appear at his arraignment, action to enforce the ticket is suspended during the pendency of the appeal. Berger had the right to appeal the ticket and could have delayed its enforcement by appealing it. We reject Berger's argument that the statute denies him his due process rights.

We also reject Berger's argument that he was improperly denied the opportunity to present evidence that the time allowed for him to make repairs was arbitrary and unreasonable. As discussed above, we find that the

time for repairs is best decided on a case-by-case basis. The housing inspector testified that she based the repair time on the size of the building, the type of cited violations and the fact that there was a custodian on the property. She had more than ten years of experience as a housing inspector. We find nothing arbitrary about the inspector's actions. Berger's fourth assignment of error is without merit.

In his fifth assignment of error, Berger argues that the trial court erred in convicting him of charges that were not contained in the written warning notice issued by the housing inspector. He claims that criminally charging him with violations without prior notice denied him his due process rights. Our review of the record shows that Berger was notified of the violations he was convicted of. The warning notice issued to Berger included the following violations: rear porch fascia board deteriorated, rear porch system

in need of paint, debris in rear stairwell of cellar, cellar retaining wall needs painting. The subsequent ticket listed the following: front and rear door locks in need of repair in #9, gutter and downspouts leaking south side, exterior wood trim is in need of paint, fascia is deteriorated. Berger argues that, since only the deteriorated fascia was listed in both notices, the court erred in convicting him of other violations.

In support of his argument, Berger cites C.O. 367.04(a) which states:

> Whenever the Commissioner of Building and Housing shall find any dwelling structure or premises, or any part thereof, to be in violation of the provisions of this Housing Code, he shall give or cause to be given to the owner or agent or person in charge of such structure or premises and the mortgagee of record, a written notice stating the violations therein. Such notice shall order the owner within a stated reasonable time to repair, improve, demolish or effectively board the structure or premises concerned.

C.O. 367.05 provides that, upon his failure to make the necessary repairs, the Commissioner of Building and Housing may order the

building vacated or may pursue legal action to compel the owner to make the repairs. The statute only requires one notice of violations. The ticket issued by the inspector on July 23, 1991 fully complied with C.O. 367.04(a).

We reject Berger's argument that he was denied due process. We find that he had ample notice of the violations on his property. The inspector testified that, prior to issuing the ticket, she issued Berger a warning notice and spoke with Berger by telephone about the violations. Berger was fully advised of his right to appeal the ticket before the time of his arraignment. See C.O. 367.09. The ticket was issued July 23, 1991. Berger was ordered to appear in court on August 30,1991. Berger had ample time to make the necessary repairs and/or appeal the ticket before enforcement action began. We find that the notice provisions of C.O. 367.04(a) were fully complied with. Berger's fifth assignment of

error is without merit.

Berger next argues that the complaint against him was barred by federal preemption and that the trial constituted an improper regulation of a federal statutory program. We diagree.

State law may be preempted by federal law when a federal statute includes language that explicitly provides for preemption of state law, when the wording or legislative history of the federal statute shows Congress' intent to exclusively regulate the area, or where the state law conflicts with the federal regulatory scheme. Mowery v. Mercury Marine Div. of Brunswick Corp., (1991), 773 F. Supp. 1012. Berger argues that the Supremacy Clause provides for the preemption of any law which conflicts with federal law. However, mere differences between federal and state law do not constitute a conflict sufficient to invoke preemption. It must be shown that compliance with both federal and state regula-

tions is impossible or that the state law stands to impair achievement of the purposes and goals of the federal statute. Lever Bros. Co. v. Maurer, (1989), 712 F. Supp. 645.

In the case sub judice, Berger has not shown that there is a conflict between state and federal law. We also find no evidence that the federal government explicitly preempted state law in the area of public housing or that Congress intended to exclusively regulate the area. Berger has not established the applicabilty of preemption in this case. We overrule his sixth assignment of error.

Berger also claims federal governmental immunity from prosecution. He claims that the operation of a Section 8 property made him a federal official and that, as such, he is immune from state regulation. There is no support for his argument that the contract made him a federal official. We disagree with the argument that Berger was performing a "uniquely federal interest" in operating his

Section 8 property for the benefit of his tenants. Under the contract, Berger received rental subsidies for his Section 8 tenants. Berger clearly had a beneficial interest in the operation of the apartment building.

We also reject Beger's argument that the application of state law would disrupt the proper functioning of the federal Section 8 program. He has produced no evidence that the state housing code regulations are in conflict with federal legislation. As discussed above, differences in state and federal legislation do not indicate a conflict. We find no merit in Berger's seventh assignment of error.

Berger also argues that his conviction was against the manifest weight of the evidence. He claims that the court did not have enough evidence to convict him of violating C.O. 369.13. C.O. 369.13 provides:

> All dwelling structures and all parts thereof, both exterior and interior, shall be maintained in good repair and shall be capable of performing the function for which such structure or part of any fea-

ture thereof was designed or intended to be used.

A judgment will be reversed as against the manifest weight of the evidence only when a review of the evidence and all reasonable inferences determine that the trier of fact clearly lost its way and created a manifest miscarriage of justice sufficient to mandate the reversal of the conviction and the order of a new trial. See State v. Martin (1983), 20 Ohio App.3d 172,175. Berger argues that the fascia board was performing its function of holding up the gutters and that no violation was established. However, Berger ignores the language of the statute that requires structures to be maintained in good repair. It is reasonable to require an owner to perform basic maintenance on his property to avoid more serious damage. The inspector testified that the fascia board was deteriorated. This was enough evidence to establish a failure to keep the premises in good repair which

is a violation of C.O. 369.13. We cannot say that the trier of fact lost its way and created a manifest miscarriage of justice. Berger's eighth assignment of error is without merit.

Judgment affirmed.

It is ordered that Appellee recover of Appellant its costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

NAHRA, P.J., CONCUR.
HARPER, J., DISSENTS

/s/ Patricia Blackmon
PATRICIA BLACKMON
JUDGE

## ASSIGNMENTS OF ERROR

I. *C.O. 367.03, OF THE CLEVELAND HOUSING CODE, VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION, INASMUCH AS IT MAKES THE EXERCISE OF A CONSTITUTIONAL RIGHT A CRIMINAL OFFENSE.*

II. *THE TRIAL COURT ERRED IN DENYING BERGER'S MOTION TO SUPPRESS EVIDENCE, SINCE ALL OF THE EVIDENCE PRESENTED AGAINST HIM WAS THE DIRECT RESULT OF WARRANTLESS SEARCHES OF HIS PROPERTY WHICH VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SEC. 14 OF THE OHIO CONSTITUTION.*

III. *BERGER WAS DENIED DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND ART. I, SEC. 16 OF THE OHIO CONSTITUTION, AS C.O. 367.04 CONSTITUTES AN IMPROPER DELEGATION OF THE CITY'S LEGISLATIVE AUTHORITY TO ITS HOUSING INSPECTORS.*

IV. *THE TRIAL COURT ERRED IN NOT PERMITTING BERGER TO PRESENT EVIDENCE THAT THE TIME PROVIDED HIM BY THE CITY INSPECTOR TO MAKE THE DEMANDED REPAIRS WAS ARBITRARY AND UNREASONABLE, SO AS TO CONSTITUTE A DENIAL OF FEDERAL CONSTITUTIONAL DUE PROCESS.*

V. *THE TRIAL COURT ERRED IN CONDUCTING A TRIAL AND CONVICTING BERGER ON CHARGES THAT WERE NOT CONTAINED IN THE WRITTEN "WARNING NOTICE," AS REQUIRED BY C.O. 367.04(a), SO THAT BERGER WAS DEPRIVED OF A FEDERAL CONSTITUTIONALLY PROTECTED "LIBERTY INTEREST" WITHOUT DUE PROCESS OF LAW.*

VI. *THE TRIAL COURT ERRED IN OVERRULING BERGER'S MOTION TO DISMISS COMPLAINT, AS ITS ACTIONS WERE BARRED BY FEDERAL PREEMPTION, AS THE*

TRIAL PROCEEDING CONSTITUTED AN IMPROPER REGULATION OF A FEDERAL STATUTORY PROGRAM, WHICH IS GOVERNED BY FEDERALLY ESTABLISHED STANDARDS.

VII. THE TRIAL COURT'S ACTIONS WERE BARRED UNDER THE DOCTRINES OF FEDERAL GOVERNMENTAL OFFICIAL IMMUNITY AND/OR FEDERAL GOVERNMENTAL CONTRACTOR IMMUNITY.

VIII. BERGER'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE CONCERNING THE ONLY CHARGE THAT WAS PROPERLY BEFORE THE TRIAL COURT FOR DETERMINATION.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 63089

CITY OF CLEVELAND
Plaintiff-Appellee
- vs -
SANFORD J. BERGER
Defendant-Appellant

DISSENTING OPINION

DATE OF ANNOUNCEMENT OF DECISION SEPTEMBER 30, 1993

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HARPER, J., DISSENTING:

I respectfully dissent from the majority's resolution of this case. Specifically, I disagree with the finding that appellant lacks standing to challenge the constitutionality of Cleveland Codified Ordinance 367.03 and 367.99. I would this have sustained his first assignment of error.

In his first assignment of error, appellant asserts that Cleveland Codified Ordinance 367.03 and the penalty which flows from a violation thereof, violates the Fourth and

Fourteenth Amendments to the United States Constitution and Section 14, Article I of the Ohio Constitution. He argues that the violation occurs because the building's tenants must agree to a warrantless inspection of the building or face criminal charges. Appellant cites the cases of Wyman v. James (1971), 400 U.S. 309; Camara v. Municipal Court (1967), 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930; Wilson v. Cincinnati (1976), 46 Ohio St.2d 138 and State ex rel. Holcomb v. Wurst (1989) 63 Ohio App.3d 639 in support of his position.

The city responds to appellant's argument by attacking his standing to challenge the constitutionality of the ordinance. It avers that since appellant was not "injured by some governmental action" resulting from the application of the ordinance and citd for any violation of it, this court is without jurisdiction to entertain appellant's first assignment of error. The majority accepts this argument.

Generally, a person only has standing to challenge the constitutionality of rules and regulations that affected his interest and those rules and regulations applied to him. McNea v. Gary (N.D. Ohio 1976), 434 F. Supp. 95,103; see, also, Akron Bd. of Edn. v. State Bd. of Edn. of Ohio (C.A.6,1974), 490 F.2d 1285,1289; State v. Brooks (Jan. 10, 1991), Cuyahoga App. No. 57034, unreported. "The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who was not injured by its alleged unconstitutional provision." Palazzi v. Estate of Gardner (1987), 32 Ohio St.3d 169, syllabus.

Contrary to the city's stance in the present case that we have no "logical reason" to consider appellant's constitutional argument, this court does have jurisdiction and a very important "logical reason" to consider it.

Appellant was indeed within the class against whom the ordinance was applied, being the owner of a building in which a city housing inspector could enter without a warrant under Cleveland Codified Ordinance 367.03. Moreover, the ordinance is the only authorization that a city housing inspector can rely on to make these inspections and specifically the only authorization by which Inspector Thomas could possibly enter appellant's property on June 18, 1991. Appellant thus is within the class against whom a criminal charge could be brought pursuant to Cleveland Codified Ordinance 367.99 if he did not allow the inspector to enter the building without a warrant. Even though appellant was not charged criminally under that ordinance, the fact remains that Cleveland Codified Ordinance 367.03 was enforced against him through the inspection of his building and the inspection resulted in a criminal complaint being issued against him for a violation of the city's housing code.

He was thereby inevitably injured by the application of this allegedly unconstitutional provision.

The ordinance at issue provide in relevant part:

> "367.03 **Right of Entry**
>
> "Upon presentation of proper credentials the Commissioner of Housing and his duly authorized agents or inspectors may enter at reasonable times, or at such other times as may be necessary in an emergency, any dwelling building, structure or premises in the City to perform any duty imposed on him by this Housing Code. No person shall in any way obstruct, hinder, delay or otherwise interfere with the housing inspector in such entrance.
>
> "367.99 **Penalty**
>
> "(a) ***
>
> "*** whoever refuses to permit entry by the Housing Inspector at a reasonable hour, and whoever interferes with, obstructs, hinders or delays such housing inspector while attempting to make such inspection shall be fined not less than fifty dollars ($50.00) for the first offense, and for a second or subsequent offense shall be fined not less than one hundred dollars ($100.00), or imprisoned for not more than six months or both. A separate offense shall be deemed committed each day during or on which an offense occurs or continues.

Section 14, Article I, of the Ohio Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person or things to be seized."

The Fourth Amendment to the United States Constitution likewise protects a citizen's right to be free from all unreasonable searches. Whether the government's intrusion on an individual's property is motivated by criminal violations or by breaches of other statutory or regulatory standards, the individual's privacy interests will suffer. Marshall v. Barlow's, Inc. (1978), 436 U.S. 307,312-313, 90 S.Ct. 1816,1820-1821, 56 L. Ed.2d 305,311-312; Camara. Warrantless searches of residences are thus considered "per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." Katz v. United States (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576,585.

In Camara, a lessee refused to allow a warrantless inspection of his residence. He was arrested and charged with a violation of the San Francisco Housing Code, specifically:

> "Authorized employees of the city departments or city agencies, so far as may be necessary for the performance of their duties, shall upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the city to perform any duty imposed upon them by the Municipal Code.

Camara, 387 U.S. at 526, 87 S.Ct. at 1730.

The United States Supreme Court, concerned with the increasing use of housing and health inspections and in light of its endeavor to more clearly define Fourth Amendment protections, re-examined "whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights as those rights are enforced against the States through the Fourteenth Amendment." Id., 387 U.S. at 525, 87 S.Ct. at 1729, 18 L.Ed.2d at 933. Moreover, the review was prompted by marginal decisions in Frank v.

Maryland (1959), 359 U.S. 360, 79 S.Ct. 804, 3 L.Ed.2d 877 and Ohio ex rel. Eaton v. Price (1960), 364 U.S. 263, 80 S.Ct. 1463, 4 L.Ed2d 1708, wherein criminal convictions were affirmed based upon an individual's refusal to allow a warrantless entrance and inspection of his premises.

In Frank, a health inspector discovered evidence of a rat infestation in a private residence. He requested the owner's permission to inspect the basement of the house without having a warrant. The owner refused to cooperate and was later convicted for not allowing the inspection. The Frank court found the statute which punished this property owner for refusing to cooperate with a warrantless inspection to be constitutional.

The Frank decision was thereafter generally interpreted and cited as carving out an additional exception to the warrant requirement. This exception was applied even though Frank was distinguishable based upon language

in the ordinance at issue which required "inspection for cause."

The Frank majority came to its conclusion by characterizing municipal fire, health and housing inspection programs as only touching upon "the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion ***." Frank, 359 U.S. at 367, 79 S.Ct. at 809 3 L.Ed.2d at 882. The programs only touch upon constitutional guarantees because they are regulatory in nature and are not meant to secure evidence of criminal activity. Therefore, "historic interests of 'self-protection' jointly protected by the Fourth and Fifth Amendments are said not to be involved, but only the less intense 'right to be secure from intrusion into personal privacy.' " Camara, 387 U.S. at 530, 87 S.Ct. at 1731, 18 L.Ed.2d at 1936.

The Camara court recognized, in reviewing Frank, that these types of inspection pro-

grams were less hostile than "criminal" searches. It nonetheless found the Frank majority's characterization of the housing inspections as less deserving of Fourth Amendment protection to be abnormal because the codes are enforced through criminal processes, includinf the issuance of a criminal complaint and as in the present case, criminal penalties for a refusal to permit the inspection. Id., 387 U.S. at 530, 87 S.Ct. at 1732, 18 L.Ed.2d 936.

The Camara court further discredited the remaining justifications, suggested by the Frank majority, for allowing warrantless inspections: (1) the inspections are minimally demanding as they require a certain amount of reasonableness; and (2) the warrant requirement would not be effective under these circumstances becuae it would lead to "rubber stamping" of warrants. These justifications undercut the purpose behind the Fourth Amendment warrant requirement. The court explained:

"*** Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvas an area. Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspectors decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. *** We simply cannot say that the protections provided by the warrant procedures are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty."

Id., 387 U.S. 532-533, 87 S.Ct. at 1732-1733, 18 L.Ed.2d at 937-938.

Finally, the court discounted the justification that public welfare commands that the

inspections not be subjected to a warrant requirement. After all, a warrant requirement does not destroy a municipality's right to inspect pursuant to its fire, health and housing standards. It merely sets forth confines of reasonableness without frustrating the government's purpose in conducting the search. Id., 387 U.S. at 533, 87 S.Ct. at 1733, 18 L.Ed.2d at 938.

In applying these concepts to the facts before it, the Camara court, in overruling Frank, held this:

> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons set forth in Frank v. State of Maryland and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections."

Id., 387 U.S. at 534, 87 S.Ct. at 1733, 18 L.Ed.2d at 938.

The court adopted the following language from Johnson v. United States (1948), 333 U.S. 10,14, 68 S.Ct. 367,369, 92 L.Ed2d 436, 440 with regard to its holding:

> " 'The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule to be decided by a judicial officer, not by a policeman or government enforcement agent.' " (Emphasis added)

However, a concept which constitutionally attaches to the warrant requirement is probable cause. The Camara court, therefore, continued its analysis to determine whether probable cause is a necessary predicate to inspections of this type.

The court initially discussed the purpose behind the programs, i.e., obtaining compliance with minimal regulatory standards to safeguard the public from health and safety hazards. In determining whether there is probable cause to issue a warrant for an in-

spection and thereby determing its reasonableness, "the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." Camara, 387 U.S. at 535, 87 S.Ct. at 1734, 18 L.Ed2d at 939.

It was then clearly recognized that the only means to secure complaince with minimum regulatory standards of a municipality is through routine periodic inspections. Such periodic inspections were deemed reasonable as a result of long-term judicial and public acceptance and because not only are they a limited invasion of a citizen's privacy, they are the only means to adequately achieve compliance. Id.

The linchpin for determining whether probable cause exists to inspect a premises is not the inspector's belief that a certain dwelling is in violation of the code, but the reasonableness of the appraisal of the conditions of the area to be searched as a whole. If a reasonable belief exists that a condi-

tion is present or could develop which would threaten the safety of the public, probable cause is demonstrated to inspect a certain dwelling even though there is no particular cause to search that dwelling. Thus, the court stated that probable cause can be based, e.g., upon the passage of time, the type of building, or the condition of the general neighborhood. Id., 387 U.S. at 538, 87 S.Ct. at 1735, 18 L.Ed.2d at 941.

This is the point at which it become apparent that the level of probable cause required for one of these inspections is less than that required for searches conducted in the normal criminal context. For the latter, the items to be recovered need to be specified as well as their location. The Camara court thus relaxed the standard of probable cause required for warrants in the routine administrative search area.

Whether the relaxed standard applies to searches which are induced by citizen com-

plaints is questionable, considering that the Camara court focused on the necessity of periodic and routine inspections in formulating the standard. See, Note, Administrative Search Warrants (1974), 58 Minn.L.Rev. 607, 655. The court accepted the diluted probable cause equation for periodic inspections because it guards against singling out a particular dwelling rather than conducting area wide searches. Therefore, conducting searches premised upon anonymous tips, without using the traditional probable cause analysis, may produce "the danger that local officials might harass unpopular individuals." Id.,639.

The Camara court moreover recognized two traditional exceptions when search warrants were not required for periodic and area inspections. First, the holding in Camara was not "intended to foreclose prompt inspection even without a warrant, *** in emergency situations." Second, since most citizens would allow inspections of their property

without a warrant, the court suspected that a majority of inspections would occur by consent. Moreover, these "consent inspections" were apparently given select status. After all, "as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused ***." Camara, 387 U.S. at 539,540, 87 S.Ct. at 1736 18 L.Ed.2d at 941.

Although the Camara court recognized that consent could justify a warrantless inspection, it failed to provide any guidelines to be followed in determining valid consent. An issue that naturally arises, therefore, is whether, considering the court's relaxation of the standard for probable cause for an administrative search, did it likewise alter the standard for reviewing consent. However, one need not address this issue in Ohio.

The Camara decision's contribution to a

municipality's inspection programs, i.e., consent searches, was taken away by the Supreme Court of Ohio in Wilson. In Wilson, the city of cincinnati enacted two ordinances which modified and amended its building code. The ordinances required a homeowner to tender to a prospective buyer a Certificate of Housing Inspection prior to entering into a sales contract. The homeowner seller, however, could only obtain a certificate by permitting an inspector to enter his property at an agreed to time. The failure to obtain the certificate subjected the seller to criminal penalty. Wilson, 139-140.

The Supreme Court of Ohio, in reviewing the appellant's claim that the ordinances were an unconstitutional exercise of police power, first noted that "the seller is faced with a serious dilemna" in that he must either consent to a warrantless search or face the possibility of a criminal penalty. Id., 143. It then noted, however, that "*** a

valid consent involves a waiver of constitutional rights and cannot be lightly inferred; hence, it must be 'voluntary and uncoerced, either physically or psychologically.' " Wilson, 143-144, citing United States v. Fike (CA5,1972), 449 F.2d 191,193; Phelper v. Decker, (CA5,1968), 401 F.2d 232; Cipres v. United States, (CA9,1965), 343 F.2d 95. Based upon these principles, the court concluded that the coercion wich flows from the sole alternative of criminal penalty "negates any 'consent' which may be inferred from the allowance of the inspection and, therefore, the validity of such searches upon the basis of consent is not sustainable." Id., 144.

The Wilson court reached this decision without reference to Camara's "consent" language, thereby completely ignoring the latter's recognition of the consent exception.

Ironically, the court then cited Camara thereafter as further support for its holding which states:

> "*** where a municipal ordinance requires the owner of real property to tender a certificate of housing inspection to a prospective buyer, and such certificate may be obtained only by allowing a warrantless inspection of the property, the imposition of a criminal penalty upon the owner's failure to tender the certificate violates the owner's rights under the Fourth Amendment to the U.S. Constitution."
>
> Wilson, 145. To allow the ordinance to stand would place an individual in a position not tolerated by the Camara court, being that the individual must agree to a warrantless inspection or face criminal penalty. Id.

The Wilson court thus adopted that portion of Camara which signifies that the Fourth Amendment prohibits the prosecution of a person who refuses to permit a warrantless code-enforced inspection of his personal residence. See, also, United States v. Biswell (1972), 406 U.S. 311, 92 S.Ct. 595, 32 L.Ed2d 87 (warrantless search of a locked firearms storeroom during business hours did not violate Fourth Amendment when authorized by Gun

Control Act of 1986); See v. Seattle (1967), 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (where the Camara personal residence warrant requirement under the Fourth Amendment was extended to inspections of private commercial premises). It remains clear, therefore, that the Wilson court would have found the search which occurred therein to be unreasonable based upon lack of consent even without Camara's review of administrative searches.

This court's analysis must, therefore, necessarily cease here without further review with regard to consent. Cleveland Codified Ordinance 367.03 places a citizen in a dilemna by offering only two choices, either agreement to the search or criminal penalty. The majority's venture into the "consent" arena and how it relates to the ordinance opposes Wilson's mandate that "consent" is not a viable justification of an administrative search when a criminal penalty is the only alternative to agreeing to the search.

The language of Cleveland Codified Ordinance 367.03 nearly mimics the language of the San Francisco Codified Ordinance in Camara. As already stated, supra, warrantless searches of residences are presumptively in violation of the Fourth Amendment. Cleveland Codified Ordinance 367.03 transposes this concept by making warrantless searches the rule and searches justified by warrants the exception. Thomas herself testified that, "the only time that I, as an inspector, would obtain a warrant is if we were not permitted entry." Albeit the enactment of housing codes and their enforcement are generally valid exercises of the powers of local self-government, they cannot be exercised by steamrolling an individual's protected constitutional right to be free from unlawful searches.

I thus allude to Justice Celebrezze's concurring opinion in Wilson, where he states:

"Insertion of a clause within the ordin-

> ance at issue herein requiring the officials charged with conducting the housing inspections pursuant to the aforesaid ordinance to obtain a search warrant whenever a homeowner refuses to permit a warrantless inspection of his premises, after advising such person that he or she had a constitutional right to refuse entry of the officials without a warrant, would save the constitutionality of the criminal penalties provided in the ordinance for the refusal of a homeowner to permit inspection of his premises."

Wilson, 147.

The ordinance in the present case does not contain such a requirement. Hence, I find that Cleveland Codified Ordinances 367.03 and 367.99, authorizing the imposition of criminal penalties against a property owner who refuses to permit a warrantless search by a housing inspector, are in violation of the Fourth Amendment to the United States Constitution and Section 14, Article I, of the Ohio Constitution. Camara; Wilson.

It is true that in State ex rel. Holcomb, the Butler County Court of Appeals held that a county auditor's plan for interior inspection of homes to reappraise property values

for taxation purposes was constitutional. State ex rel. Holcomb, 636. It was initially noted that administrative searches are intrusions upon Fourth Amendment interests but that consent searches are a recognized exception to the warrant requirement. Id., 633, citing Schneckloth v. Bustamonte (1973), 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854; Camara. The court, however, clarified that its decision to find the plan constitutional was based on the many features of the plan which indicated that consent would be voluntary. Specifically, the plan provided for: 1) consent to be requested at the person's home; 2) all individuals to be giving consent to be adult property owners; 3) daylight inspections; 4) data collectors to not be in uniform, armed or wearing badges; 5) posssession of standardized identification cards; 6) data collectors to not have any discretion, rather homeowners were to be given an opportunity to have interior inspections; 7) and "[f]inally,

and most importantly, the inspections are for administrative, not criminal purposes. There is no penalty for refusing to consent and no criminal consequence involved in consenting to an inspection." (Emphasis added.) Id., 625. The plan found to be constitutional in State ex rel. Holcomb is an entirely different creature than the ordinance at issue in the present case based upon these factors alone.

Accordingly, I dissent.

**Cleveland Municipal Court**

State of Ohio ) WM. CORRIGAN 12/13/91
City of Cleveland ) WM. CORRIGAN 12/17/91
Plaintiff ) NO. 91CRB21611
VS. )
Sandford Berger ) JUDGMENT ENTRY
Defendant )

CASE CALLED; DEFENDANT PLEADS "PNG"
(not guilty)/guilty/no contest

TO THE CHARGE OF "H.C. Ticket" ...M.C./O.R.C.

DEFENDANT (BTH) "FG"
found not guilty/discharged/(found guilty)

DEFENDANT SENTENCED AS FOLLOWS (Bench Trial Held)

"Motion to Suppress Denied." "(Began 12/13/91; CON'T TO 12/17/91 1:30)"

$50 + COSTS
TTP Jan 31,92

/s/ Wm. H. Corrigan
Judge

Filed: January 15, 1992

## 42 U.S.C. Sec. 1437

GENERAL PROGRAM OF ASSISTED HOUSING

**Sec. 1437. Declaration of policy**

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this Act [42 USCS ¶¶1437 et seq.], to vest in public housing agencies the maximum amount of responsibility in the administration of their housing programs. ****

24 C.F.R. Sec. 882.109

**§882.109 Housing quality standards.**

Housing used in this program shall meet the Performance Requirements set forth in this section. In addition, the housing shall meet the Acceptability Criteria set forth in this section except for such variations as are proposed by the PHA and approved by HUD. Local climatic or geological conditions or local codes are examples which may justify such variations.

CLEVELAND CODIFIED ORDINANCE 367.09

**367.09 Right of Appeal.**

The owner, agent or person in charge of any dwelling structure shall have the right to appeal from any notice issued by the Commissioner of Housing, within the time specified in such notice for compliance therewith, ... to show cause why he should not comply with such notice ... Failure to file an appeal within the time prescribed shall constitute a waiver of the right to appeal. Filing of an appeal from any notice of the Commissioner shall suspend action on enforcement of such notice until the appeal is acted upon by the Board of Building Standards. .....

## UNITED STATES CONSTITUTION

### Supremacy Clause, Article VI, Clause 2

This Constitution and the Laws of the United States which shall be made in pursuance thereof; ..., shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

### Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Amendment 4

The right of the people to be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## CLEVELAND CODIFIED ORDINANCE 367.04

**367.04 Notice of Violation**

(a) Whenever the Commissioner of Building and Housing shall find any dwelling structure or premises, or any part thereof, to be in violation of the provisions of this Housing Code, he shall give or cause to be given to the owner or agent or person in charge of such structure or premises, and the mortgagee of record, a written notice stating the violations therein. Such notice shall order the owner within a stated reasonable time to repair, improve, demolish or effectively board the structure or premises concerned.